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No. 90-196

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STATE SALVAGE, INC.,
A CALIFORNIA CORPORATION;
COUNSEL FOR STATE SALVAGE, INC.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART, Chief Assistant
Attorney General
EDWARD T. FOGEL, JR.,
Assistant Attorney General
ROY C. PREMINGER,
Deputy Attorney General
LINDA C. JOHNSON,
Deputy Attorney General

3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-3212

Attorneys for Respondent

QUESTIONS PRESENTED

Whether an unreasonable search occurred when a search warrant was executed at a law firm for a client's records where: (1) the records were the raw business records of the client, State Salvage, for an audited period and two separate audits of these records revealed that State Salvage had defrauded the California Recycling Program; (2) one of these audits determined the amount of unsubstantiated claims submitted by State Salvage amounted to more than $4 million; (3) these records had been moved to the attorney's office; (4) during the execution of the warrant, one of the attorneys for the law firm led the special agents executing the warrant to the documents; and (5) the only claim of privilege was made as to the firm's own files on the client, and these files were

reviewed solely by a neutral Special Master.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

On October 16, 1989,

California's Department of Justice,

Bureau of Investigation, was requested by

the Department of Conservation

(hereinafter DOC), the state agency which manages the state's recycling program, to investigate allegations uncovered during an audit of State Salvage, Inc., a certified recycler. DOC's audit found that approximately $4.8 million in fraudulent claims had been submitted by State Salvage. (Exh. A, p. 1 of Investigative Report.)[1/]

On October 19, 1989, of the California Department of Justice Bureau of Investigation Special Agent Hirigoyen was assigned to the investigation. He obtained a copy of DOC's audit report and interviewed the auditor who prepared the report as well as the auditor's manager. The audit covered the period of October

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1. All references, unless otherwise indicated, are to the Appendix to Petitioner's Peremptory Writ of Mandate filed with the California Court of Appeal on January 22, 1990.

1988 through July 1989. It concluded that State Salvage had billed the State of California Recycling Fund over $4 million for California Redemption Value, which had purportedly been paid to customers and consumers, but was not substantiated by receipts and logs as required by law. (Exh. A, p. 2 of Search Warrant and Affidavit.)

On November 15, 1989, Special Agent Hirigoyen met with Alan Cates, Audit Supervisor for the State of California's Controller's Office, who had done an independent audit of State Salvage for the period covering May 1989 through September 1989. Cate's audit concluded, too, that State Salvage had billed the State of California Recycling Fund for California Redemption Value purportedly paid to customers and consumers which was not substantiated.

(Exh. A, pp. 2-3 of Search Warrant and Affidavit.)

Cates informed Special Agent Hirigoyen that when he went to State Salvage's business location on October 25, 1989, in furtherance of his audit, he was informed by one of the employees that all of State Salvage's business records that covered the period of DOC's audit had been packaged and delivered to the law firm of Beck & DeCorso. He went to this law firm the next day, accompanied by Larry Lewinson, Vice-President and Manager of State Salvage, and met with Attorney Beck. Beck permitted Cates and Lewinson to look into the contents of the seven archive-size boxes of State Salvage business records in possession of the law firm. (Exh. A, p. 3 of Search Warrant and Affidavit.)

Special Agent Hirigoyen sought a

search warrant to obtain possession of State Salvage's business records that had been moved to their attorney's office (Beck & DeCorso) in order to conduct his criminal investigation to determine if State Salvate had criminally defrauded the State Recycling Program. His search warrant was first reviewed by State of California Supervising Deputy Attorney General Linda C. Johnson. It was then taken to Superior Court Judge William R. Pounders who signed the search warrant and appointed a Special Master to assist in the execution of the warrant. (Exh. A, pp. 1, 4-5 of Search Warrant and Affidavit.)

On November 21, 1989, at approximately 1:30 in the afternoon the search warrant was executed on the law office of Beck & DeCorso. Special Master Soladar, accompanied by three California Depart-

ment of Justice special agents, all dressed in business suits, exited the elevator and walked into a common reception area shared with other tenants on the floor. The only person present in addition to the receptionist was a courier. The agents requested to speak with either Attorney Beck or Attorney DeCorso. However, neither was present so the receptionist contacted Attorney Barrera, who works in the law firm. Attorney Barrera came out to the reception area. She was shown a copy of the search warrant and the Special Master as well as Supervising Special Agent King were introduced to Ms. Barrera. At some point it was explained to Ms. Barrera that the special agents were there to take possession of non-privileged material, but that only Special Master Soladar would take possession of

privileged material, which would be taken directly to court. (Exh. D, Decl. of King p. 1; Exh. D, Depo. Of Special Master Soladar p. 5; Exh. D, Decl. Phillips p. 1.)

When asked where the business records of State Salvage were located, Ms. Barrera led the men directly to a small office. She specifically touched the 13 boxes belonging to State Salvage. Ms. Barrera indicated that the law firm had not yet reviewed these records. When asked by Special Master Soladar whether she claimed any privilege to any of the contents of these boxes, Ms. Barrera replied, "No." She further stated that these were the raw business records of State Salvage. Thus, Special Master Soladar permitted the agents to begin taking possession of these boxes. The agents filled out property receipts

before carrying the boxes to their car. (Exh. D, Depo. of Special Master Soladar pp. 6-8; Exh. D, Decl. of Phillips pp. 2-3.)

Special Master Soladar then accompanied Ms. Barrera to her office where she had other material belonging to State Salvage to which she claimed a privilege. Special Master Soladar reviewed this material and retrieved the documents that he felt fell within the scope of the search warrant. Ms. Barrera was permitted to make a copy of these documents. Special Master Soladar then placed them in a sealed envelope and delivered them directly to the superior court. The entire sequence of events, from the arrival of Special Master Soladar and the agents until their departure, took approximately 1 hour and 10 minutes. (Exh. D, Depo. of Special Master Soladar

pp. 8-10, 14-15; Exh. D, Decl. of King p. 5.)

Within 3 days of the execution of the warrant, as permitted under California Penal Code section 1524, subdivision (c)(2)[2/], petitioners moved to quash the search warrant on the bases of the special master statute (Pen. Code section 1524) being unconstitutional on its face and unconstitutional as applied and the search warrant being facially defective.[3/] After a two day hearing, the Superior Court of Los Angeles County ruled that the special master statute is

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2. A copy of the statute is attached to Petitioner's Petition for Writ of Certiorari as Appendix E.

3. Petitioners also made a motion for a Franks v. Delaware 438 U.S. 154 (1978) hearing because they claimed that the search warrant affidavit contained material omissions and misstatements. However, Petitioners concede that only the motion to quash is at issue in the instant petition. (Petn. p. 14 fn. 4.)

not unconstitutional on its face, nor was it unconstitutionally applied, nor was the search warrant facially defective. (Exh. F, pp. 35-36, 159-160.)

On January 22, 1990, petitioners filed a Petition for Peremptory Writ of Mandate with the California Court of Appeal, Second Appellate District, Division One. On January, 21, 1990, the Court of Appeal denied the Petition without opinion. (Petn. Appendix D.)

Petitioners filed a Petition for Review with the California Supreme Court on February 9, 1990. This petition was denied on April 25, 1990, without an opinion. (Petn. Appendix A.)

* * * * * *

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF ARGUMENT

I

Petitioners seek certiorari review claiming that it is unreasonable to execute a search warrant for a client's business records which are in the possession of the client's attorney unless other lesser restrictive alternatives have been tried first. (Petn. pp. 17-18, 33-34.)

Respondent submits that, pursuant to precedent of this Honorable Court it is not unreasonable, as violative of the Fourth Amendment, to search an attorney's law offices. Moreover, to date, there has been no requirement that lesser alternatives be attempted before a search warrant may be secured.

In the instant case, great care was

taken to make the intrusion as minimal as possible. A special master was appointed and the special agents who accompanied him were dressed in business attire. Moreover, one of the attorneys of the firm led them directly to the boxes containing the raw business records of their client, State Salvage. It was only after the attorney claimed no privilege as to the contents of these boxes that the special agents took possession of them. Thereafter, the attorney led the special master to her office where he, and only he, reviewed the contents of some additional files to see if any of the documents fell within the parameters of the warrant. As to these files, the attorney claimed a privilege. Consequently, all of the documents removed from these files were placed in a sealed envelope and delivered immediately to the superior

court. The entire time span, from the special masters' and the agents' arrival at the law firm until their departure, was approximately 1 hour and 10 minutes.

Under these facts, the trial court properly found that the search was reasonable and, therefore, proper under the Fourth Amendment. Because its ruling is correct, no important issue is presented to this Court for its resolution. Consequently, petitioners request for certiorari review should be denied.

II

CERTIORARI REVIEW SHOULD NOT BE GRANTED BECAUSE PETITIONERS HAVE NOT RAISED AN IMPORTANT ISSUE; THE TRIAL COURT'S RULING THAT THE SEARCH OF THE ATTORNEY'S OFICE WAS RASONABLE IS IN ACCORD WITH PRECEDENT OF THIS COURT

Petitioners contend that the search of the law office of Beck & DeCorso for the business records of State Salvage was unreasonable within the meaning of the

Fourth Amendment because lesser alternatives were not tried before execution of the warrant. Petitioners amplify that, under the circumstances of this case, the lesser alternatives would have been: (1) informally requesting access to the documents; (2) obtaining a subpoena; or (3) providing advance notice to the law firm that the search warrant would be served. (Petn. pp. 17-18, 33-34.) The record demonstrates that the search was reasonable, and, therefore, proper under the Fourth Amendment.

First of all, this Court has held that search warrants directed against attorney's files in their offices are not per se unreasonable, as violative of the Fourth Amendment. Andresen v. Maryland 427 U.S. 463, 478-484 (1976). Therefore, inasmuch as searches of attorney's offices are not per se unreasonable, the

question in the present case is whether California Penal Code section 1524(c) permits unreasonable searches of attorney law offices when the attorneys themselves are not suspected of engaging in criminal activity.

As this Court has indicated in numerous cases, the key principle of the Fourth Amendment is reasonableness, which of necessity involves the balancing of competing interests. Delaware v. Prouse 440 U.S. 648, 653-654 (1979); Marshall v. Barlow's, Inc. 436 U.S. 543, 555 (1976).

Prior to the enactment of subdivision (c) of Penal Code section 1524 in 1979, allegedly privileged information in the possession of the professionals listed in this subdivision, including attorneys, could be lawfully searched for and seized without the assistance of a special master. See Deukmejian v.

Superior Court 103 Cal.App.3d 253, 162 Cal.Rptr. 857 (1980). However, because of concerns about the need to protect privileged material in the possession of these professionals versus the state's legitimate interest in combating sophisticated white collar crime, the Legislature adopted subdivision (c). This subdivision mandates the use of a special master to ensure the protection of the privileges involved, except where there is a reasonable suspicion of criminal activity on the part of the professional. Thus, subdivision (c) has dual purposes: (1) to protect privileged information in the possession of specific professionals; and (2) to combat white collar crime by permitting the search of suspects by normal warrant procedures.

To protect any privileged material in the possession of the professional at

the time the search warrant is executed, subdivision (c) specifically requires the following: (1) that a special master be appointed, who is a member of good standing with the California State Bar, who will accompany the person who will serve the warrant; (2) that, whenever practicable, the warrant be served during business hours; (3) that the warrant be served upon the party who appears to have possession or control of the items sought; (4) that the special master shall inform the party served of the specific items being sought and provide the party with the opportunity to provide the items; (5) that only if the party fails to provide the items requested, shall the special master conduct a search for the items in the areas indicated on the search warrant; (6) that if the party served claims a privilege to any of the

material, these items should be placed in a sealed envelope by the special master and taken to court; (7) that the special master keep confidential any information he obtains, except in direct response to inquiry by the court; and, (8) that, within 3 days of the execution of the warrant, the party searched is entitled to a hearing in superior court, where he can raise any suppression issues as well as claim a privilege to the items taken.

Thus, if is not per se unreasonable to search an attorney's office for attorney files, a statute such as Penal Code section 1524, subdivision (c), which adds numerous conditions upon the service of a search warrant on an attorney's office, is more stringent rather than less stringent in its requirement of reasonableness.

Further, the instant execution of

the warrant met the more stringent requirements of subdivision (c). A special master accompanied the special agents, who were all attired in business suits. They arrived at the law firm of Beck & DeCorso at approximately 1:30 in the afternoon, which clearly was during business hours. After stating their purpose, identifying the special master and his function, and permitting Ms. Barrera to review the search warrant, they requested to be led to the documents covered under the warrant. Ms. Barrera, an attorney very knowledgeable regarding the State Salvage matter, led them to the location of 13 boxes of State Salvage's business records, which she specifically touched to ensure there was no miscommunication regarding these boxes. She also pronounced that there was no privilege as to these documents because

they were the raw business records of State Salvage. It was only after this clear disclaimer of privilege that the special agents took possession of the boxes and began preparing a property receipt for the law firm. (Exh. D, Depo. of Special Master Soladar pp. 5-8; Exh. D, Decl. of Phillips pp. 2-3; Exh. D, Decl. of King pp. 1, 4.)

Thereafter, Ms. Barrera led the special master to her office where other files regarding State Salvage were kept. Only the special master looked through these files because Ms. Barrera claimed a privilege as to the contents. He removed only those items falling within the parameters of the search warrant; they were placed in a sealed envelope and taken directly to the court after he left the law office. This entire sequence of events only lasted approximately 1 hour

and 10 minutes. Ms. Barrera led them to all of the evidence; there was never any exploratory search for the items covered under the warrant. (Exh. D, Depo. of Special Master Soladar pp. 8-10, 14-15; Exh. D, Decl. of King pp. 3-5.)

Respondent submits that this was, indeed, a minimal intrusion upon the law firm, that was executed in a very reasonable and professional manner. Therefore, it in no way violated the Fourth Amendment, as the superior court properly so found. (Exh. F pp. 159-160.)

Petitioners, here, are making a novel request -- that the Court require that lesser alternatives be attempted prior to the execution of a warrant, in order for the execution to be reasonable under the Fourth Amendment.

No decision of this Honorable Court, to date, has made such a ruling and Peti-

tioners cite none. While lesser alternatives are perhaps always an option, they are not constitutionally mandated before execution of a search warrant can be a reasonable option. Respondent suggests that, once a search warrant has been selected as the appropriate method in a particular case for the retrieval of evidence, the issue before the court is not whether there were other options available but whether the warrant was properly executed within the meaning of the Fourth Amendment. And, as demonstrated above, the search warrant definitely was executed in a reasonable manner in the instant case.

Moreover, while many options may exist, it must be recognized that there are valid reasons for using a search warrant in an investigation, as opposed to other methods. In fact, this Court in

Zurcher v. Stanford Daily 436 U.S. 547 (1977), not only noted the importance of the search warrant in a criminal investigation, but also clearly articulated one of the reasons why a search warrant is sometimes preferred over a subpoena duces tecum, one of the lesser alternatives specifically mentioned by petitioners.

> "As the District Court understands it, denying third-party search warrants would not have substantial adverse effects on criminal investigations because the nonsuspect third party, once served with a subpoena, will preserve the evidence and ultimately lawfully respond. The difficulty with this assumption is that search warrants are often employed early in an investigation, perhaps before the identity of any

likely criminal and certainly before all the perpetrators are or could be known. The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends or at least not to notify those who could be damaged by the evidence that the authorities are aware of its location. In any event, it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena duces tecum, offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, what-

ever the good faith of the third party.

"Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of [a] crime, involves hazards to criminal investigation much more serious than the District Court believed. . . ." Zurcher v. Stanford Daily, supra, at p. 561.

In sum, petitioners have failed to show that the ruling of the trial court was incorrect in light of precedent established by this Court; therefore, they have failed to establish that this case presents an important issue that must be resolved by this Court.

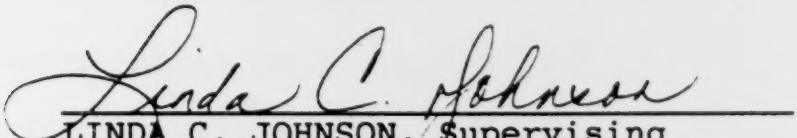
CONCLUSION

For the foregoing reasons, respondent requests that the Petition for Certiorari be denied.

DATED: October 30, 1990.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART, Chief Assistant
Attorney General
EDWARD T. FOGEL, JR., Senior
Assistant Attorney General
ROY C. PREMINGER,
Deputy Attorney General



LINDA C. JOHNSON, Supervising
Deputy Attorney General
[Counsel of Record]

Attorneys for Respondent

LCJ:lh
LA89IV0018

DECLARATION OF SERVICE BY MAIL

Re: STATE SALVAGE, INC., A CALIFORNIA CORPORATION; COUNSEL FORSTATE SALVAGE, INC., v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

No. 90-196

I, JOSEPHINE D. ROSE, declare that I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served three copies of the attached

BRIEF OF RESPONDENT IN OPPOSITION

on each of the following, by placing in an envelope addressed as follows:

The Supreme Court of the
State of California
3580 Wilshire Blvd., Rm. 213
Los Angeles, CA 90010

Clerk of the Court
The Supreme Court of the
State of California
4250 State Building
350 McAllister St.
San Francisco, CA 94102

Hon. Curtis Rappe
Los Angeles Superior Court
Criminal Courts Building
210 W. Temple St.
Los Angeles, CA 90012

Clerk of the Court of Appeal
Court of Appeal
Second Appellate District
3580 Wilshire Blvd., Rm. 301
Los Angeles, CA 90010

Mark E. Beck
Beck & DeCorso
811 W. 7th St. 11th Flr.
Los Angeles, CA 90017

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Each said envelope was then, on NOV 1 - 1990 sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOV 1 - 1990 at Los Angeles, California.

Declarant

JOSEPHINE D. ROSE

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